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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73 [illegible]

ANTONIO M. VILLA, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No. _____

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SUPREME COURT OF THE UNITED STATES

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ANTONIO M. VILLA,)
)
Petitioner,)
)
vs.)
)
UNITED STATES OF AMERICA,)
)
Respondent.)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR FOR THE TENTH CIRCUIT

Antonio M. Villa, your Petitioner, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case, on January 8, 1974, affirming the United States District Court for the District of Colorado, wherein Petitioner was convicted for willfully aiding and assisting in the preparation and filing of false and fraudulent income tax returns in violation of 26 U.S.C. §7206(2).

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit entered on January 8, 1974 (Appendix A, infra) has not been selected for official publication.

No formal opinion was delivered by the United States District Court for the District of Colorado.

DATE OF JUDGMENT AND TIME OF ENTRY

The Judgment of the United States Court of Appeals for the Tenth Circuit was entered on January 8, 1974. Petition for Rehearing and Rehearing en bank was denied on January 28, 1974.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. The acts of the District Court, as sanctioned by the Tenth Circuit, are such a departure from the usual and accepted course of judicial proceedings as to have violated Petitioner's Constitutional rights, thereby calling for an exercise of this Court's power of supervision, in that:

(a) The Tenth Circuit's construction of 26 U.S.C. §7206(2) fails to hold the Government to its burden of proof;

(b) The Tenth Circuit's sanction of the Government's use of books it knows are inaccurate as the basis for its entire case for a conviction under 26 U.S.C. 7206(2) violates due process;

(c) The Tenth Circuit's sanction of the admissibility of prejudicial, conclusionary testimony of the taxpayers of additional taxes paid violated Petitioner's right of confrontation;

(d) The Tenth Circuit's sanction of the Trial Court's submittal of this case to the speculation and surmise of the jury violated Petitioner's constitutional rights.

2. The Tenth Circuit's construction of §7206(2) is so divergent and so conflicting with decisions of other circuits on the construction and application of that statute, that:

(a) The interpretation of the statute is so novel as to have violated Petitioner's Fifth Amendment rights;

(b) The Tenth Circuit has decided an important question of federal law which has not been decided by this Honorable Court.

3. The Trial Circuit's sanction of the Trial Court's failure to allow the

Petitioner to testify that he had no intent to file a false or fraudulent return violates Petitioner's constitutional rights, thereby calling for an exercise of this Court's power of supervision.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

26 U.S.C. §7206(2); in pertinent part:

SEC. 7206. Fraud and False Statements.

Any person who--

. . .

(2) Aid or Assistance.--Willfully aids or assists in, or procures, counsels or advises the preparation or presentation under, or in connection with any matter arising under, the Internal Revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Fifth Amendment to the Constitution of the United States:

AMENDMENT V--CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS;

JUST COMPENSATION FOR PROPERTY. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Sixth Amendment to the Constitution of the United States:

AMENDMENT VI--In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

28 U.S.C. §1732 (See Appendix C).

CONCISE STATEMENT OF THE CASE

Petitioner Antonio M. Villa was indicted on February 9, 1973, on grand jury charges in five counts that he willfully aided and assisted in, and procured,

counseled and advised the preparation and presentation to the Director, Internal Revenue Service Center, Austin, Texas, of Forms 1040, which tax returns were allegedly false and fraudulent as to material matters, and that Antonio M. Villa allegedly then well knew and believed that such tax returns were fraudulent and false as to material matters, all allegedly in violation of Title 26, United States Code, Section 7206(2) and Title 18, United States Code, Section 2.

The Petitioner, an accountant, engaged himself in the full-time preparation of income tax returns in 1966. The Petitioner's offices were located in his residence in Colorado Springs, Colorado, and the number of assistants in his employ varied between 9 and 13 people. In each of the years 1969 and 1970, the Petitioner personally prepared over 2,000 tax returns.

The initial step in Petitioner's procedure in performing his service was to interview his clients on an appointment basis. At such interviews, the clients were asked to bring with them their records and all pertinent documents that would affect their income tax return. At such interviews, the Petitioner would counsel and confer with his clients to determine the proper amount of taxes payable or refund due the client, depending upon the client's particular circumstances and situation. The figures arrived at as a result of such interviews would subsequently be checked by the Petitioner's assistants for mechanical errors and for verification that the tax amount was correct under the tax regulations.

The taxpayers involved in Count I of the Indictment, a Mr. and Mrs. Cisneros, the only Government witnesses on this Count, brought the records of their small concrete business with them to an interview with the Petitioner, for the purpose of preparing their 1969 income tax return. When the Petitioner established that the books were out of balance by approximately $7,800, he went through the columns marked "Other Expenses" and "Other Payments" with the taxpayers, and established that many of the items entered in the "Other Expense" column should have been classified in the columns headed and designated as the regular expense items of the company. In the preparation of the tax return, the Petitioner, rather than using the inaccurate totals in the books, adjusted those figures, with the help of the taxpayers, to properly reflect the actual deductions that the taxpayers had. This point was verified at the trial by the taxpayers in the exact amount on the alleged overstatement of "Repairs and Maintenance." Prior to trial, an audit had been conducted by the Internal Revenue Service on the 1969 Cisneros tax return. As a result of the audit, Petitioner was charged with three criminal violations on the preparation of the taxpayers' return. However, the audit also revealed that the Petitioner overlooked a number of substantial deductions available to the taxpayers. No Government agent or accountant testified at trial in reference to said audit. The charges in Count I of the Indictment were based upon the "specific items" method, charging overstatements in deductions for "materials and supplies," "wages and salaries," and "repair and maintenance." The Government's method of proof at trial consisted only of the testimony

of the two taxpayers, and a comparison of the figures in their books to the tax return in question. An out-of-balance condition existed in the taxpayers' books (Env. Ex. 1-3), as the total expenses exceeded the total cash and checks paid out by $7,734.44. The competency of the books was in issue throughout the trial, and the Record on Appeal is replete with testimony from all of the witnesses on this Count demonstrating the patent inadequacy of the taxpayers' books; analysis of Env. Exhibit 1-3 demonstrates that 11 of the 17 entries for totals in the taxpayers' "Quarterly Summary" were incorrect. (see next page.) The Government, basing its case on a comparison of the totals on the summary page of the books to the tax return in question, used the books as evidence of the truth of what they recorded. Yet, at trial, on cross-examination of the Petitioner, the Government demonstrated its knowledge that the books upon which it was basing its case were grossly incorrect.

The figures on the adjusted tax return in question on this Count, according to the taxpayers' testimony, were the self-same figures that were completed under the taxpayers' observance at the taxpayers' interview. The taxpayers' interview having taken place over three years prior to the trial, the testimony of all witnesses to this Count was vague and unremembering. In this crucial area, in determining whether there was any basis at the taxpayers' interview, other than the incorrect books, for adjusting the figures on the tax return, Mrs. Cisneros only "recalled" no other conversations concerning the three items, while the other taxpayer, Mr. Cisneros, thought that all

ENV. EXHIBIT 1-3 QUARTERLY SUMMARY	AMOUNTS PER QUARTERLY SUMMARY	CORRECT JOURNAL ENTRIES	AMOUNT OF ERROR
Total cash paid out--checks	$118,720.00	$118,820.40	$ 100.40
Total cash paid out--cash	378.66	670.29	291.63
F.O.A.B.	1,492.54	1,492.54	-0-
WH tax	3,504.60	3,395.60	109.00
Other deductions	535.22	535.73	.51
Materials & supplies	50,054.82	49,568.82	486.00
Sub-contract cost	2,641.00	2,641.00	-0-
Salaries--wages	42,989.68	32,992.68	10,003.00
Truck & car expense	1,989.60	1,989.60	-0-
Repair & maintenance	1,164.22	1,164.22	-0-
Taxes & licenses	1,734.97	1,638.41	96.56
Telephone & utilities	-0-	510.72	510.72
Advertising & insurance	633.55	633.55	-0-
Other expense	8,386.78	10,994.04	2,607.26
Other payment	21,428.70	21,513.70	85.00
Misc. operating supplies	669.19	775.75	106.56
Interest	162.22	162.22	-0-
Total amount of errors			$14,396.64

of the "Other Expenses" had been discussed with the Petitioner at the interview. One of the three charges of this Count, an alleged $200.00 overstatement of deductions for "Repairs and Maintenance" was completely verified and justified by the taxpayers as having been misclassified in the "Other Expense" column.

No Government agent or accountant testified at the trial, yet the Government attempted, and succeeded, over the objection of the Petitioner, in admitting into evidence, the results, in the form of additional taxes paid, of a Government audit of the tax return in question. Without the audit, itself, being offered into evidence, and without any Government agent's testimony to lay the foundation for the audit, the Government's method here was to ask the taxpayer, Mrs. Cisneros, whether "part" of the additional taxes paid was based upon the three items in question. On a subsequent Count of this Indictment, the Trial Court reversed its ruling when exactly the same questions were put to the witness, on the grounds that such testimony was not the best evidence of the audit, or that the agent who made the audit was not present.

On direct examination of Petitioner at trial, the Trial Court failed to allow counsel for Petitioner to pursue examination of the Petitioner regarding whether Petitioner ever intended to defraud the Internal Revenue Service of the Government of the United States in reference to this Indictment.

Upon this state of the evidence, the Petitioner was convicted on Count I of the

Indictment under the statute, the only count considered by the Tenth Circuit in its affirmation of the conviction. The decision of the Tenth Circuit concluded that during the course of the taxpayers' interview, the Petitioner asked only for the totals shown by the taxpayers' books, yet the decision recognized that one of the two taxpayers testified that the expense items must have been discussed at the meeting. The Tenth Circuit's decision also recognized that the books contained errors, yet deduced that the books were, and apparently, legally must have been the sole basis for the return, and concluded irresolutely that "The amounts inserted in the tax return did not result from adjustments of the books, but apparently were determined by Villa without any basis." (Emphasis added.)

REASONS FOR GRANTING THE WRIT

I. THE ACTS OF THE DISTRICT COURT, AS SANCTIONED BY THE TENTH CIRCUIT, ARE SUCH A DEPARTURE FROM THE USUAL AND ACCEPTED COURSE OF JUDICIAL PROCEEDINGS AS TO HAVE VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS, THEREBY CALLING FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION, IN THAT:

A. THE TENTH CIRCUIT'S CONSTRUCTION OF 26 U.S.C. §7206(2) FAILS TO HOLD THE GOVERNMENT TO ITS BURDEN OF PROOF.

The conviction of the Petitioner, under the state of the evidence adduced at trial by the Government, is of great significance in the field of tax fraud. The decision appears to hold that if a

tax preparer does not use the faulty, inaccurate books of a taxpayer as his basis for preparing a tax return, he must shoulder the burden of proof or be found guilty in the preparation of those returns. The decision is also of great significance and importance regarding the quantum of evidence upon which a case under 26 U.S.C. 7206(2) can be submitted to the jury. The major factors absent in the instant case which intertwine through virtually all of the reported cases under §7206(2) are as follows:

(a) Unequivocal testimony of the taxpayers concerning the information that they did, or did not, convey to the tax return preparer,

(b) Competent books of the taxpayer, and,

(c) Proper introduction of an audit to demonstrate what the tax should have been, accompanied by the testimony of a Government agent who prepared said audit.

As the statute applies in the instant case, each of three essential elements required to be proved beyond a reasonable doubt in order to establish the offense charged in the Indictment were as follows:

First: The act or acts of aiding, or assisting in, or procuring, or counselling, or advising, the preparation or the presentation, of a false or fraudulent income tax return, as charged;

Second: Doing such act or acts with knowledge that the income tax

return in question was false or fraudulent, as charged; and

Third: Doing such act or acts willfully. Edwards v. United States, 375 F.2d 862 (9th Cir. 1967).

The word "willfulness," as applied in federal tax felony situations necessarily requires a finding of "bad" purpose or "evil motive." United States v. Bishop, 412 U.S. 346, 93 S.Ct. 2008 (1973). As to proof of lawful deductions, the evidence in the case need not establish beyond a reasonable doubt that the allowable deductions were overstated in the exact amounts alleged; but it must establish that the accused willfully overstated, or caused to be overstated, in some substantial amount, the deductions to which the taxpayer was entitled under the Internal Revenue laws, as charged in the indictment. United States v. Rayor, 204 F.Supp. 486 (S.D. Cal. 1962), aff'd 323 F.2d 519 (9th Cir. 1963). The willfulness required for conviction under the statute cannot be inferred from a mere overstatement of claimed deductions. McCarty v. United States, 409 F.2d 793 (10th Cir. 1969).

The Petitioner submits that a perusal of the Government's case--the testimony of the Government's two witnesses, the taxpayers, themselves--found entirely at pages 3-36 of Vol. I of the transcript, simply and clearly demonstrates that the above-described evidentiary standards were not met in this case.

It was material at the trial of this case, as one of the elements of the Government's burden as to each count, that the Government establish beyond a reason-

able doubt that the return as prepared was false as claiming a substantial over-amount in lawful deductions. The Government, not introducing an audit of the return into evidence, and not producing the testimony of a government agent with respect to an audit, based its case of proving a substantial over-amount of lawful deductions on a comparison of the totals on the summary page of the books to the tax return in question.

The books of the taxpayers were introduced into evidence as being made in the regular course of business, but their competency was never established. The mere fact that documents offered in evidence are taken from a business file and are otherwise proved in compliance with 28 U.S.C. §1732, making records made in the regular course of business admissible in evidence, does not establish their competency. Schmeller v. United States, 143 F.2d 544 (6th Cir. 1944). Since the records of the taxpayer in the instant case were offered to establish the truth of what they contained, the incorrectness of the figures therein affected their competency under 28 U.S.C. §1732. Bridger v. Union Railway Company, 355 F.2d 382 (6th Cir. 1966). Where a group of documents, some containing incompetent evidence, taken from files in the regular course of business, are offered en masse, the Court must examine and rule on each paper separately, and must exclude the incompetent evidence. Schmeller, supra, 143 F.2d at p.550.

The Record on Appeal is replete with testimony from all of the witnesses on this Count demonstrating the patent inadequacy of the taxpayers' books; the

concession by the taxpayers, themselves, as to the errors in their books can be found at Tr. Vol. I, p. 20 and p. 35. The Tenth Circuit, in its Opinion, recognized that these books were in error. Notwithstanding the fact that the taxpayers' books were patently inadequate, and that the testimony of the taxpayers as to whether an itemized discussion of deductions had occurred at the taxpayers' interview was at least equivocal, the proof adduced by the Government at trial was never direct to the issue of whether the taxpayer was not entitled to the deductions as they appeared on the return. The books were manifestly incorrect; the Government's method of proof was to have its witness compare the totals on the summary sheet of those incorrect books to the figures in the return. The summary totals being in error, it follows in an elementary fashion that the Government's burden was to go beyond mere totals and show the proper deductions that should have been taken; the Record just does not show that the return as prepared was false as claiming a substantial over-amount in lawful deductions.

Even if the Government had taken the proper probative steps to establish the claiming of a substantial over-amount of lawful deductions, willfulness must involve more than a mere overstatement of claimed deductions. McCarty, supra. The adjusted tax return in question here was the self-same return that was completed under taxpayers' observance at the taxpayers' interview; the Government had to prove the Petitioner's willfulness by independent evidence pertaining to the taxpayers' interview. The only independent evidence adduced at trial pertaining to what occurred at the taxpayers' interview, other

than the testimony of the Petitioner, was the testimony of the Government's witnesses --the taxpayers. In this regard, Mr. Cisneros, the taxpayer, testified affirmatively in the following fashion (Tr., Vol. I, pp. 34-35):

> Q. In other words, you think you and Mr. Villa did sit down and go through all these items which are under "Other Expenses"?
>
> A. We must have, yes, sir.
>
> Q. And your total on that is how much?
>
> A. $8,386.78.
>
> Q. All right, and those were what you have classified "Other Expenses" that were not set forth as specific items in your books, right?
>
> A. Yes, sir.
>
> Q. All right, and Mr. Villa went through that with you to see if you had any other expenses which might be deductible, didn't he, at the time you filled out your return?
>
> A. We had to go through it, yes, sir.
> (Emphasis added).

The combination of the taxpayers' books, being patently incorrect, and offered to establish the truth of what they contained, the absence of a properly introduced audit and Governmental expert testimony with respect thereto, and the equivocal testimony of taxpayers as to

whether a basis existed at the taxpayers' interview for adjusting the figures on the return, so significantly detract from the quantum of evidence required for conviction under §7206(2), that the Trial Court's failure to hold the Government to its burden of proof, is such a departure from the usual and accepted course of judicial proceedings in tax fraud cases as to have violated Petitioner's constitutional rights under the Due Process Clause of the fifth amendment, thereby calling for an exercise of this Honorable Court's power of supervision.

B. THE TENTH CIRCUIT'S SANCTION OF THE GOVERNMENT'S USE OF BOOKS IT KNOWS ARE INACCURATE AS THE BASIS FOR ITS ENTIRE CASE FOR A CONVICTION UNDER 26 U.S.C. 7206(2) VIOLATES DUE PROCESS.

The Government, basing its case on a comparison of the totals on the summary page of the books to the tax return in question, demonstrated at trial its knowledge that the books upon which it was basing its case were grossly incorrect; on cross-examination of the Defendant pertaining to wages and salaries:

> Q. All right, and wasn't her figure [wages and salaries] <u>also $10,000 overstated</u>?
>
> A. Yes, Sir, it was. I have that analysis here. (Tr., Vol. I, p. 104; emphasis added).

And at pp. 114-115 of the transcript, pertaining to expenses:

> Q. First, answer my question. Isn't

it a fact that the $7700 was excess of expenses over income, excess of the righthand page over the lefthand page?

A. Yes, sir, it would be.

A conviction that is tainted by a knowing use of false evidence to persuade of guilt is one as to which there had been a violation of due process. Napue v. People of State of Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). The same is true as to a situation of false evidence which though not solicited, has knowingly been allowed to go uncorrected after it appears. Napue, supra; Link v. United States, 352 F.2d 207 (8th Cir. 1965).

In the instant case, the Government's knowing use of incorrect books to persuade of guilt, coupled with the Government's failure to submit into eivdence the eminently important audit and expert witness testimony in reference thereto, was a violation of Petitioner's constitutional rights of due process, thereby calling for an exercise of this Court's power of supervision.

C. THE TENTH CIRCUIT'S SANCTION OF THE ADMISSIBILITY OF PREJUDICIAL, CONCLUSIONARY TESTIMONY OF THE TAXPAYERS OF ADDITIONAL TAXES PAID VIOLATED PETITIONER'S RIGHT OF CONFRONTATION.

Long ago, in Burton v. Driggs, 20 Wall. 125, 22 L.Ed. 299 (1873), this Honorable Court stated that:

"When it is necessary to prove

> the results of voluminous facts or of the examination of many books and papers, and the examination cannot conveniently be made in court, the results may be proved by the person who made the examination." (Emphasis added.)

Not only was there no showing in the instant case why an examination of the audit of the tax return in question could not conveniently be made in court, but the ultimate results of the audit were attempted to be proved by a person who did not make the examination.

The truly expert or competent witness at the trial of the instant case would have been the Government agent or accountant who performed the audit of the tax return in question. Even though the Government agent did not testify in this case, and the documents pertaining to the audit were not introduced into evidence, counsel for the Government attempted to obtain the same effect in front of the jury, by asking the taxpayer, over the objection of the Petitioner, whether a "part" of the additional taxes paid as a result of the audit, were attributable to the three deduction items in question. Mrs. Cisneros, the taxpayer, was being used, not as a true expert witness, but rather as "summary" witness, who merely summarized the ultimate result of the audit. United States v. Williams, 447 F.2d 1285 (5th Cir. 1971). The testimony of a summary witness is admissible only if the original records which the witness is summarizing are themselves introduced into evidence. McDaniel v. United States, 343 F.2d 785 (5th Cir. 1965); Greenhill v. United States, 298 F.2d 405 (5th Cir. 1952).

In the instant case, not only were the records of the audit, itself, never introduced into evidence, but the man who prepared them was unavailable for cross-examination before the jury. Regarding the audit, the Government did not rely on the Business Records Statute, but instead relied on a less reliable source of evidence--a lay "summary" witness. Had even the more reliable documentation of the audit been admitted into evidence, the law is that the Government must produce the maker of any important record whenever possible in a criminal prosecution, rather than relying on the Business Records statute, having in mind the constitutional guaranty of confrontation. United States v. Johns-Manville Corporation, 255 F. Supp. 61 (E.D. Penn. 1963). No legitimate exception to the hearsay rule was involved on this issue in the instant case. The jury in the instant case was undeniably exposed to the speculative "summary" testimony that a "part" of the additional taxes paid as a result of the audit were attributable to the deduction items in question; the audit was never introduced into evidence, and the agent who prepared it was never available for cross-examination. These acts certainly transgressed the Petitioner's right of confrontation granted by the sixth amendment, and fit squarely within the spirit of this Honorable Court's recounting, in California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), that the vice which gave impetus to the confrontation claim:

> ". . . was the practice of trying defendants on 'evidence' which consisted solely of ex parte affidavits or depositions secured by the examining magistrates, thus denying the

> defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact."

As this Court stated in Turner v. State of Louisiana, 379 U.S. 546, 85 S.Ct. 546 (1965):

> "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel. What happened in this case operated to subvert these basic guarantees of trial by jury."

The "evidence developed" against the Petitioner in the instant case transgressed Petitioner's right of confrontation granted by the sixth amendment, thereby calling for an exercise of this Court's power of supervision.

D. THE TENTH CIRCUIT'S SANCTION OF THE TRIAL COURT'S SUBMITTAL OF THIS CASE TO THE SPECULATION AND SURMISE OF THE JURY VIOLATED PETITIONER'S CONSTUTIONAL RIGHTS.

This Honorable Court has explicitly held that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. In Re Winship, 397 U.S. 359, 90 S.Ct. 1068 (1970).

> "Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights, as those maxims prescribe for the class of cases to which the one being dealt with belongs." (Emphasis added.) Dukich v. Blair, 3 F.2d 302 (E.D. Wash. 1925), appeal dismissed 270 U.S. 670, 46 S.Ct. 469, 70 L.Ed. 791.

The "class of cases" under §7206(2) prosecutions are unique in that the defendants are accused of willfully aiding, or assisting in, or procuring, counseling or advising in the preparation of a false or fraudulent tax return. In apparently all of the reported decisions under said statute, the accused can expect to confront testimony of the taxpayers, the introduction of the return that was prepared for the taxpayers, the taxpayers' records, the audit of the tax return in question, and the testimony of a Government agent with respect to the audit. When the competency of the books as a basis for the tax return is in question, the audit and the expert governmental testimony in reference thereto become a necessity in establishing that a substantial over-amount of lawful deductions were taken.

A very important consideration in determining whether the defendant had a fair trial is to ascertain if the Government was overreaching. Samish v. United States, 223 F.2d 358 (9th Cir. 1955). If, as in the instant case, the competency of the books is in issue, and the Government

recognizes the inadequacy of the books, but continues to base its case solely upon them, and a proper audit and corresponding expert testimony are unavailable, the situation confronting the Defendant is such an exertion of governmental powers as to not be within the settled maxims and under such safeguards for the protection of individual rights as the law permits and sanctions.

The Trial Court's admission into evidence of the taxpayer's testimony that a "part" of the additional taxes paid as a result of an audit, in the absence of the introduction into evidence of the audit, itself, and expert governmental testimony in reference thereto, flies in the face of the two decisions in which this Honorable Court has addressed itself to the expert testimony of Government agents in tax cases. United States v. Johnson, 319 U.S. 503, 63 S.Ct. 1233 (1943); Costello v. United States, 350 U.S. 359, 76 S.Ct. 406 (1956). In both cases, and unlike the instant case, not only did the Government witness testify regarding the tax returns in question, but their testimony and computations were based upon evidence already in the record.

At a later point in the trial, on another count, the Government again baldly asked the taxpayer if additional taxes were paid with respect to an audit. (Tr., Vol. I, p. 44). The Trial Court this time sustained Petitioner's objection, on the ground that such testimony was not the best evidence of the audit, and that the witness who prepared the audit was not present.

The evidence complained of herein,

however, pertains to Count I of the Indictment, the Count upon which the question of the innocence of the guilt of the Petitioner was the closest. There can be no doubt that there is a reasonable possibility that the evidence complained of might have contributed to this conviction, Fahy v. State of Connecticut, 375 U.S. 89, 84 S.Ct. 229 (1963), and that a reviewing court cannot say, with fair assurance, that the jury's judgment was not swayed thereby. This Honorable Court has recognized that even harmless-error rules can work very unfair and mischievous results, when, for example, highly important and persuasive evidence, though legally forbidden, firds its way into a trial in which the question of innocence or guilt is a close one. Chapman v. State of California, 386 U.S. 23, 87 S.Ct. 824 (1967).

Unlike the situation in this Court's decision in Johnson, supra, the possibility is substantial in the instant case that the jury was mislead into the notion that "part" of the additional taxes paid by the taxpayer as a result of the audit must be accepted as proof of the Petitioner's specific intent on this count.

When the prosecution's accountants are allowed to present their calculations from books and returns in evidence, such evidence, when based upon documents themselves competent and accessible, is always admissible; a jury without such guidance would be totally unable to cope with complicated accounts. United States v. Kelley, 105 F.2d 912 (2d Cir. 1939). Considering the testimony admitted in the instant case, and the complicated accounts involved, the conclusion is inevitable

that the jury in the instant case was left to surmise and conjecture. The submittal of this case to the speculation and surmise of the jury was such a departure from the usual and accepted course of judicial proceedings as to have violated Petitioner's constitutional rights.

II. THE TENTH CIRCUIT'S CONSTRUCTION OF §7206(2) IS SO DIVERGENT AND SO CONFLICTING WITH DECISIONS OF OTHER CIRCUITS ON THE QUESTION OF THE CONSTRUCTION OF THAT STATUTE AS TO HAVE DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN SETTLED BY THIS HONORABLE COURT, AND IS SO NOVEL IN ITS INTERPRETATION OF THE STATUTE AS TO HAVE VIOLATED PETITIONER'S FIFTH AMENDMENT RIGHTS.

The Tenth Circuit's construction of §7206(2) is so novel in its interpretation of the statute, and is so divergent and so conflicting with decisions of other circuits, when similar factual situations presented themselves in those courts, that Petitioner's fifth amendment due process rights have been violated.

The Sixth Circuit in United States v. McKee, 456 F.2d 1049 (6th Cir. 1972), considered a prima facie case as having been made under 26 U.S.C. §7206(2) when the following 3 components of evidence had been adduced:

1. the income tax return signed as having been prepared by the appellant,

2. the testimony of the taxpayer that the tax return in question was the one for which he had come to the appellant for its preparation, and

3. the unequivocal denial of the taxpayer that he had furnished the appellant with business expense information that was reflected on the return.

The third element of the prima facie case that was made in McKee is unqualifiedly absent in the instant case, as an examination of the entire testimony of the taxpayers reveals. Other distinguishing factors that exist in the instant case, but which do not appear to have been a consideration in the McKee case, are the serious inadequacies that existed in the materials that were presented to Petitioner for the preparation of the return in question, and the dissimilar nature of Petitioner's conduct in relation to the other counts of this indictment.

The facts adduced in the instant case do not remotely resemble those established in other cases which have resulted in convictions of accountants or income tax preparers under 26 U.S.C. 7206(2) or its predecessor, 26 U.S.C. 3793(b)(1). In United States v. Borgis, 182 F.2d 274 (7th Cir. 1950), numerous taxpayers testified exactly as to unwarranted increases in dependency exemptions and charitable contributions that were entered on their income tax returns by the Defendant during the taxpayer's interviews. The conviction of the Defendant in United States v. Barnes, 313 F.2d 325 (6th Cir. 1963), was based upon the interviews of the taxpayers by the Defendant, the placing by the Defendant of a price-tag on the right to receive a refund, the denial of the taxpayers that false exemption information was given to the Defendant by them, the gain which the Defendant stood to realize from inflating

the refund claims, the uniform inflation of the claims by one exemption to the extent of fabricating names on returns, and the appearance of the Defendant's name as attorney-in-fact in the endorsements of the refund checks. The conviction of the Defendant in United States v. Herskovitz, 209 F.2d 881 (2d Cir. 1954), was based upon the establishment of a scheme which padded deductions on the tax returns so that every return, when filed, requested a refund from the Government. The taxpayers in that case tesified that the names of the organizations listed under contributions, the deductions taken for charitable contributions, and the deductions taken for New York City Sales Tax, Miscellaneous Tax, doctors and dentists, medications, work-clothes, worktools, depreciation on car, repairs on car and traveling expenses, were not given by them to the Defendants during the interview, although this information appeared on the worksheets. The conviction of the Defendant in United States v. Blount, 330 F.2d 331 (7th Cir. 1964), was based upon the testimony of the taxpayer who categorically denied that, during his interview with the Defendant, he had informed the Defendant of numerous facts, yet the return as prepared by the Defendant represented these to be facts.

The Tenth Circuit's construction of §7206(2) is in direct conflict with the decisions of other Circuits as to when a prima facie case is made under the statute, and, as such, violated Petitioner's constitutional guaranty of due process.

III. THE ACT OF THE DISTRICT COURT, AS SANCTIONED BY THE TENTH CIRCUIT, IN NOT ALLOWING THE DEFENDANT TO TESTIFY THAT HE HAD NO INTENT TO FILE A FALSE OR FRAUDULENT RETURN, VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS.

On direct examination at the trial of the instant case (Tr., Vol. 1, p. 86), the Petitioner was not allowed by the Court to testify that if a taxpayer had not given him the information, that he would not have adjusted the figures on the tax return. This issue was raised on appeal, but the Tenth Circuit did not address itself to it, although the issue flies in the face of several decisions of that Circuit.

An accused, as a part of his defense, is entitled to wide latitude in the introduction of evidence, which tends to show lack of specific intent. United States v. Brown, 411 F.2d 1134 (10th Cir. 1969). Where willfulness is an essential element of the offense charged, the defendant may testify not only that he had no such purpose, but he may also within reasonable limits, support his statement with testimony of relevant circumstances. Peterson v. United tates, 268 F.2d 87 (10th Cir. 1959). The error was prejudicial, and the excluded line of evidence, where considered with all of the other evidence, might alone have created reasonable doubt. Dearing v. United States, 167 F.2d 310 (10th Cir. 1948).

CONCLUSION

Petitioner respectfully submits that 26 U.S.C. §7206(2) cannot be construed to convict a preparer of a tax return when the testimony of the taxpayers as to whether any basis existed for adjusting the figures in question was at least equivocal; where the competency of the taxpayer's books were at issue throughout the trial, and said competency was never established; and when no audit or expert governmental testimony in reference thereto were offered into evidence to establish a substantial overstatement of lawful deductions. The unique and unprecedented construction given §7206(2) by the Tenth Circuit is in conflict with other Circuits and presents an important question of the proper construction of this statute as to require a ruling by this Court.

Furthermore, the deviations by the District Court, as sanctioned by the Tenth Circuit, from the usual and accepted course of judicial proceedings in admitting prejudicial testimony, failing to hold the Government to its burden of proof, and by submitting this case to the speculation and surmise of the jury, have denied Petitioner a fair and impartial trial pursuant to the standards of due process and confrontation as to call for this Court's exercise of its power of supervision.

Respectfully submitted,

HINDRY & MEYER

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ATTORNEYS FOR
PETITIONER

APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JANUARY TERM - 1974

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 73-1417
	)	
ANTONIO M. VILLA,	)	
	)	
Defendant-Appellant.	)	

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(No. 73-CR-45)

W. Allen Spurgeon, Deputy U. S. Attorney, Denver, Colorado (James L. Treece, U. S. Attorney, and Paul D. Cooper, Assistant U. S. Attorney, Denver, Colorado, on the Brief), for Plaintiff-Appellee.

Charles F. Brega, Denver, Colorado, for Defendant-Appellant.

Before PICKETT, SETH and DOYLE, Circuit Judges.

PICKETT, Circuit Judge.

Appellant Antonio M. Villa, a resident of Colorado Springs, Colorado, was an accountant engaged in the business or preparing income tax returns for clients. He was charged in a five-count indictment with willfully aiding and assisting in the preparation and filing of false and fraudulent individual income tax returns during the years 1969 and 1970 in violation of 26 U.S.C. §7206(2) (1970). He appeals from convictions and two-year concurrent sentences on three of the five counts.1/ The sufficiency of the evidence to sustain the convictions is questioned as to the three counts.

Count I relates to the 1969 joint income tax return of Lloyd and Pansy Cisneros. Lloyd Cisneros was a cement contractor and his wife was the bookkeeper for the business. They met by appointment with Villa at his place of business and presented their business books to him for the purpose of having him prepare their 1969 income tax return. The books disclosed revenue and expense connected with the Cisneros business. As shown by the books, the principal business costs to be deducted from income for tax purposes were material and supplies, $50,054.82; salaries and wages, $42,989.68; and machinery repairs, $1,164.22. In preparing the income tax return and computing the tax due, Villa inserted as deductions for materials and supplies, $54,699.47; salaries and wages, $48,522.04; and machinery repairs, $1,364.22. The tax return, as prepared by Villa and filed by

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1/ The jury returned not guilty verdicts on Counts IV and V of the Indictment.

the Cisneroses without reviewing it, entitled them to a tax refund. The discrepancy in these items was not known to the taxpayers until an audit of their books by the Internal Revenue Service disclosed a substantial deficiency in the tax due. Villa admitted using the overstated deductions and sought to justify them by later analysis of the Cisneros books. The books, however, did not support his claim.

26 U.S.C. § 7206(2) (1970) provides that any person who

> "[w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document;"

shall be guilty of a felony. To sustain a conviction under the provisions of this statute it is incumbent upon the prosecution to prove beyond a reasonable doubt that the accused acted willfully in aiding or assisting in the preparation and presentation of matters arising under the internal revenue laws of the United States which are fraudulent or false, including an income tax return. United States v. Brown, 411 F.2d 1134 (10th Cir. 1969); see United States v. Bishop, 412 U.S. 346 (1973). As the statute applies in the instant case, willfulness involves more than a mere

overstatement of claimed deductions in the preparation of an income tax return. Holland v. United States, 348 U.S. 121, 139 (1954); United States v. Tager, 479 F.2d 120 (10th Cir. 1973); McCarty v. United States, 409 F.2d 793 (10th Cir.), cert. denied, 396 U.S. 836 (1969). In United States v. Murdock, 290 U.S. 389, 394 (1933), the Court said, "The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental." Willfullness is an essential element of the offense charged. It may be established by proof of facts and circumstances from which an inference can be reasonably drawn that the act was willfull and intentional. United States v. Dowell, 446 F.2d 145 (10th Cir.), cert. denied, 404 U.S. 984 (1971); Haskell v. United States, 241 F.2d 790 (10th Cir.), cert. denied, 354 U.S. 921 (1957); Graves v. United States, 191 F.2d 579 (10th Cir. 1951). It is contended here that the record is wholly lacking in evidence indicating that Villa intended to prepare a fraudulent return or to prove that in preparing the Cisneros return he acted with willfull intent.

Mrs. Cisneros testified that she and her husband took their business books to Villa's office for the purpose of having him prepare their 1969 joint income tax return; that Villa filled out the return using the material from her records. Copies were to be made for later delivery. During the course of the interview Villa asked only for the totals shown by her books as to the items in question here. Only the books were submitted and Mrs. Cisneros recalled no other conversation concerning the three items. Mrs. Cisneros stated that the interview lasted ten or

fifteen minutes, possibly longer.

The three deduction items in question constituted a major portion of the Cisneros business costs. Each item was substantially increased by Villa over that shown by the Cisneros books. After the interview, the Cisneroses left Villa's office with their books and did not see him again prior to the audit. Mr. Cisneros testified on cross examination that he did not remember the conversations, but thought that some of the items must have been discussed at the meeting. Villa argues that the Cisneros books are inaccurate and unreliable. The books may contain some errors, but they were the basis for the return and do not reflect the totals for the amounts of the deductible items used by Villa in preparing the return. The amounts inserted in the tax return did not result from adjustments of the books, but apparently were determined by Villa without any basis.[2/] Considering the evidence in the light most favorable to the government, as we must, it is sufficient to sustain the verdict.

Complaint is made that the court erred in admitting evidence as to the amount of the tax deficiency as determined by the Internal Revenue Service audit.

2/ Villa testified that the Cisneros return was one of thousands that he had prepared three years before and that he could not recall the specific discussions he had with Mrs. Cisneros. The only written notes were penciled on the original return. No written records of interviews such as he had with the Cisneroses were kept.

Mrs. Cisneros testified that in March or April 1971, she and her husband reported to the office of the Internal Revenue Service for the purpose of an audit of their 1969 income tax return. This was the first occasion that they had had to compare the three questioned items of deductions as disclosed by their books and those of the income tax return. The discrepancies were those shown in the Indictment. Mrs. Cisneros stated that as a result of the audit they were required to pay an additional tax of approximately $1,550. Objection was made to this testimony "on the basis that there is no question that in this case with facts as they were that would be a compromise and settlement matter." The record discloses no evidence that this was a compromise settlement. Obviously, the discrepancies in these deductible items would create a substantial income tax deficiency, and we perceive no prejudicial error in permitting the testimony.

Having sustained the conviction as to Count I, we have no need to determine the validity of the concurrent sentences imposed on Counts II and III. United States v. Tager, 479 F.2d 120 (10th Cir. 1973), and cases therein cited.

AFFIRMED.

APPENDIX B

JANUARY TERM - JANUARY 28, 1974

Before Honorable David T. Lewis, Chief Judge, Honorable John C. Pickett, Senior Circuit Judge, Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett and Honorable William E. Doyle, Circuit Judges

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	No. 73-1417
	)	
ANTONIO M. VILLA,	)	
	)	
Defendant-Appellant.	)	

This matter comes on for consideration of the petition for rehearing and rehearing en banc filed by the appellant in the above case.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Pickett, Seth and Doyle, to whom the case was argued and submitted.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on

rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the petition for rehearing en banc is denied.

APPENDIX C

26 U.S.C. §1732

§1732. Record made in regular course of business; photographic copies

(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstaces shall not affect its admissibility. . .